No. 18-6210

In the
Supreme Court of the United States

GERALD P. MITCHELL,
Petitioner,
v.
STATE OF WISCONSIN,
Respondent.

On Writ of Certiorari to the
Supreme Court of Wisconsin

BRIEF OF COLORADO, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MINNESOTA, MONTANA, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, AND SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

PHILIP J. WEISER
Attorney General

ERIC R. OLSON
Solicitor General

DANIEL E. RAUCH
Counsel to the Attorney General

L. ANDREW COOPER*
Deputy Attorney General
**Counsel of Record*

1300 Broadway, 10th Floor
Denver, Colorado 80203
Andrew.Cooper@coag.gov
(720) 508-6000

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. States may condition the privilege of driving on consent to a blood draw when an impaired driver is unconscious. 4

A. This Court has properly recognized statutory consent provisions as valid. .. 4

B. An unconscious driver's statutory consent remains valid unless revoked.. 7

II. A State's interests in warrantless blood draws outweigh those of the driver when the driver is unconscious. 10

A. With blood draws from unconscious drivers, the public interests are higher. 10

B. With blood draws from unconscious drivers, the private interests are lower. 15

CONCLUSION 20

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) ..... passim

Breithaupt v. Abram, 352 U.S. 432 (1957) 4, 15

Bumper v. North Carolina, 391 U.S. 543 (1968) 4

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) 6

Commonwealth v. March, 154 A.3d 803 (Pa. Super. Ct. 2017) 14

Commonwealth v. March, 172 A.3d 582 (Pa. 2017) 14

Florida v. Jardines, 569 U.S. 1 (2013) 6

Florida v. Jimeno, 500 U.S. 248 (1991) 9

Heien v. North Carolina, 135 S. Ct. 530 (2014) 6

Illinois v. Gates, 462 U.S. 213 (1983) 14, 16

Mackey v. Montrym, 443 U.S. 1 (1979) 5, 6, 10, 19

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 6

Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) 1

Missouri v. McNeeley, 569 U.S. 141 (2013) .... passim

People v. Roybal, 655 P.2d 410 (Colo. 1982) 14

People v. Schaufele, 325 P.3d 1060 (Colo. 2014) 13

Rochin v. California, 342 U.S. 165 (1952) 16

Schmerber v. California, 384 U.S. 757 (1966) 10, 15

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 4

Sims v. State, 358 P.3d 810 (Idaho Ct. App. 2015) 8

Skinner v. Railway Labor Executive's Ass'n, 489 U.S. 602 (1989) 5

South Dakota v. Neville, 459 U.S. 553 (1983) 1, 5, 10, 19

State v. Kliphouse, 771 So.2d 16 (Fla. Dist. Ct. App. 2004) 14

United States v. Biswell, 406 U.S. 311 (1997) 6

United States v. Knights, 534 U.S. 112 (2001) 10

United States v. Pikyavit, 527 F.3d 1126 (10th Cir. 2008) 9

Winston v. Lee, 470 U.S. 753 (1985) 15

Wyoming v. Houghton, 526 U.S. 295 (1999) 10

Constitutions

Colo. Const. Art. II § 7 15

Statutes

625 Ill. Comp. Stat. 5/11-501.1(b) 12
Ala. Code § 32-5-192(b) 12
Alaska Stat. § 28.35.035(b) 12
Ariz. Rev. Stat. Ann. § 28-1321C 12
Ark. Code Ann. § 5-65-202(b) 12
Cal. Veh. Code § 23612(a)(5) 12
Colo. Rev. Stat. § 42-4-1301.1(8) 12
Fla. Stat. § 316.1932(1)(c) 12
Ga. Code Ann. § 40-5-55(b) 12
Iowa Code § 321J.7 12
Ky. Rev. Stat. Ann. § 189A.103(2) 12
La. Rev. Stat. Ann. § 32:661B 12
Md. Code Ann., Cts & Jud. Proc. § 10-305(c) 12
Mo. Ann. Stat. § 542.276.2(1) 15
Mo. Rev. Stat. § 577.033 12
Mont. Code. Ann. § 61-8-402(3) 12
N.C. Gen. Stat. § 20-16.2(b) 12
N.H. Rev. Stat. Ann. § 265-A:13 12
N.M. Stat. Ann. § 66-8-108 12
Nev. Rev. Stat. § 484C.160 12

Ohio Rev. Code Ann. § 4511.191(4) 12
Okla. Stat. tit. 47, §751 12
Or. Rev. Stat. § 813.140 12
S.C. Code Ann. § 56-5-2950(H) 12
Tenn. Code Ann. § 55-10-406(i) 12
Tex. Transp. Code Ann. § 724.014 12
Utah Code Ann. § 41-6a-522 12
Vt. Stat. Ann. tit. 23, § 1202(a)(2) 12
W. Va. Code, § 17C-5-7(a) 12
Wis. Stat. § 343.305(3)(b) 12
Wyo. Stat. Ann. 1977 § 31-6-102(c) 12

Other Authorities

1 Flem K. Whited III, *Drinking/Driving Litigation: Criminal and Civil* §7.6 (2d ed. 2016) 12

2 W. LaFave, Search and Seizure § 4.3(b) (5th ed.) 15

4 W. LaFave, Search and Seizure § 8.1(c) (5th ed.) 7

NHTSA, The Economic and Societal Impact Of Motor Vehicle Crashes, 2010 (Revised) (No. 812013, May 2015) 11

NHTSA, Traffic Safety Facts, 2017 Data, Alcohol–Impaired Driving (No. 812630, Nov. 2018) 11

Patricia C. Kussman, What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute, Regulation, or Ordinance - Being in Physical Control or Actual Physical Control - Motorist Sleeping or Unconscious, 93 A.L.R. 6th 207, §§ 14-31 (2014) 12

INTEREST OF AMICI CURIAE

This case concerns the constitutionality of a statute authorizing a warrantless blood draw from impaired drivers who are unconscious. Twenty-nine States have such statutes. In many cases prosecuted under those statutes, the suspect's unconsciousness was caused by an accident. Many of the state statutes authorizing blood draws from unconscious suspects specifically address situations where death or injury has been suffered by victims.

Also, all 50 States—even those not having unconscious driver provisions—have general implied consent statutes that could be impacted by this case. Like all implied consent statutes, the statutes with unconscious driver provisions operate on the principle that impaired suspects have consented to chemical testing by the act of driving. This case, involving an unconscious suspect who never withdrew his statutory consent, has implications for every form of implied consent statute.

The Amici States have an overwhelming interest in enforcing their implied consent statutes. These statutes play a critical role in the effort to eradicate the human "carnage" that is caused by impaired driving "with tragic frequency." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990).

SUMMARY OF THE ARGUMENT

I. States may condition the privilege of driving on consent to a blood draw when there is probable cause for an impaired driving offense, and the driver is unconscious.

a. This Court has recognized that implied consent statutes are valid. Under those statutes, people consent—by the act of driving—to providing a sample of their breath or blood for chemical testing, when there is probable cause. Most suspects cooperate with the police, but do so under an awareness that failure to cooperate can result in license revocation or other consequences. In light of those consequences, the voluntariness of their consent to testing is best understood to occur not during their interactions with the police, but instead during the wholly voluntary act of driving. With unconscious drivers, consent likewise occurs in the act of driving, not during interactions with the police.

b. Consent to any search can be withdrawn. If a conscious driver withdraws statutory consent, and no other exception to the warrant requirement exists, the police cannot obtain a test sample unless they obtain a warrant. Similarly, if a driver withdraws consent before falling unconscious—or is unconscious from the outset but becomes alert and withdraws consent before a sample is taken—the driver's withdrawal of consent must be honored. If, however, the unconscious driver never withdraws consent, the police may obtain a warrantless sample based on the driver's previously-given, statutory consent.

II. Warrantless blood draws from unconscious drivers, based on statutory consent, comport with the Fourth Amendment's requirement of reasonableness.

a. When a driver is unconscious, a State's interest in obtaining a warrantless blood sample is high. These cases typically involve an accident with victims who have suffered injury or death. One of the most effective tools normally available to the police—the ability to obtain cooperation with testing through a warning about the consequences of refusal—is unavailable. And the suspect's unconsciousness may have been due to a traffic accident or a medical event such as a seizure, rather than intoxication. It therefore takes longer to discern the existence of probable cause, and even longer to explain probable cause to a magistrate. All of these factors heighten the need for the police to obtain an expeditious, warrantless blood sample, before the suspect's alcohol level dissipates.

b. A warrantless blood draw unquestionably implicates privacy interests, but when a driver is unconscious, the usual analysis of those interests must be altered. Timely samples will show some suspects to be innocent, and unconscious drivers are unable to communicate their desire to undergo a blood draw. And in any event, with unconscious drivers, a blood draw causes no pain, anxiety, embarrassment, or even inconvenience. In this particular context, the interests of the individual are outweighed by those of the public.

ARGUMENT

I. States may condition the privilege of driving on consent to a blood draw when an impaired driver is unconscious.

In *Breithaupt v. Abram*, 352 U.S. 432, 435–40 (1957), this Court held that a warrantless blood draw from an unconscious, impaired driver does not violate due process. Such a blood draw likewise does not violate the Fourth Amendment's prohibition on unreasonable searches, in States where drivers have statutorily—through the act of driving—given their consent. Although consent to a search can be withdrawn before a search occurs, unconscious drivers typically have done nothing to withdraw their consent.

A. This Court has properly recognized statutory consent provisions as valid.

The Fourth Amendment prohibits searches of persons that are "unreasonable," and, for a search to be reasonable, police officers usually must obtain a warrant. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). The warrant requirement, however, has several exceptions, and one exception is when a person has given consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Consent searches are valid only if they are voluntary; the person's cooperation must not be the result of duress or coercion. *Id.* at 219, 248. For consent to be valid, the person need not know that they have a right to refuse, *id.* at 231–43, but they must do more than merely acquiesce to an officer's claim of authority to conduct a search. *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968).

Although breath and blood tests are Fourth Amendment searches, *Skinner v. Railway Labor Executive's Ass'n*, 489 U.S. 602, 616–17 (1989), this Court has recognized that States may require drivers to cooperate with such searches by enacting "implied consent" statutes. Those statutes make the driver's cooperation a condition of driving, and the statutes induce the driver's cooperation by imposing sanctions for refusing. For example, refusing to cooperate with chemical testing can result in administrative license revocation. *See Mackey v. Montrym*, 443 U.S. 1, 11–19 (1979). Refusal can also result in admitting in evidence, at a criminal trial, a driver's statement of refusal—regardless of whether the driver was warned. *South Dakota v. Neville*, 459 U.S. 553, 558–66 (1983). While States may not go so far as to criminalize a refusal to undergo a blood draw, States *are* allowed to criminalize a refusal to take a breath test. *Birchfield*, 136 S. Ct. at 2184–86. And if the driver acquiesces to testing, the test results are admissible in a criminal trial. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (recognizing that the Court has referred approvingly to implied consent statutes as a means of obtaining evidence); *Missouri v. McNeeley*, 569 U.S. 141, 160–61 (2013) (plurality opinion) (recognizing that implied consent statutes are one of the "broad range of legal tools" States may use to obtain evidence of a driver's blood alcohol content, or "BAC").

Here, unconscious drivers, by definition, cannot consent at the time of a search. Instead, the voluntariness of their search must be found in the statutory consent drivers give when they engage in the voluntary act of driving. To be sure, drivers do not, by

the mere act of driving, literally verbalize their consent; their consent instead is inferred from the circumstances. *See Birchfield*, at 2185 (noting that the Court has "referred approvingly to the general concept of implied consent laws" and that "sometimes consent to a search need not be express but may be fairly inferred from the context"). In *Birchfield*, the Court cited two other examples of implied consent from different contexts. The first was *Florida v. Jardines*, 569 U.S. 1, 7–8 (2013), which recognized that homeowners implicitly consent that anyone can approach their front door to knock. The second was *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978), which recognized that some activities are so pervasively regulated that anyone embarking on them voluntarily chooses to be subject to a full arsenal of governmental regulation.

While the regulated activities discussed in *Marshall* were businesses, *see United States v. Biswell*, 406 U.S. 311, 316 (1997) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74, 77 (1970) (liquor), there are non-business activities that are pervasively regulated, including driving. To drive legally in any state, a person must be licensed, and a failure to comply with certain conditions can lead to the license being revoked. *See Mackey*, 443 U.S. 1, 11–19. Drivers can be seized if their vehicles do not have the required number of functioning brake-lights or similar equipment. *See Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014). And unlike walking, the activity of driving is subject to exacting regulations concerning speed, direction of movement, signaling before turning, and waiting at

red lights—even if there is no oncoming traffic that presents any safety concern. Simply put, driving is one of the most pervasively regulated activities in which most people will ever engage.

Like all driving regulations, implied consent statutes are directly linked to the critical goal of preserving roadway safety. States therefore can require that, as a condition of driving, people give their implied consent to chemical testing when the police have probable cause for an impaired driving offense. *See Birchfield*, 136 S. Ct. at 2185–86 (recognizing the ongoing validity of such laws). Given that most suspects receive a polite reminder that refusal will result in sanctions, the voluntariness of a person's submission to testing is best understood to lie not in their interactions with the police, but rather in the conduct that occurs shortly before those interactions—the wholly voluntary act of driving.

B. An unconscious driver's statutory consent remains valid unless revoked.

Consent to a search "may be withdrawn or limited at any time prior to the completion of the search." 4 W. LaFave, Search and Seizure § 8.1(c) & n.171 (5th ed.) (collecting cases). This rule applies with implied consent laws: in *McNeeley* the driver withdrew statutory consent by refusing to cooperate with voluntary testing, so unless there existed some other exception to the warrant requirement—such as exigent circumstances, as measured by the totality of the circumstances—the police needed to obtain a warrant. *McNeeley*, 569 U.S. at 145–46, 148–56.

The rule applies with drivers who are unconscious. Implied consent requires no affirmative act to remain in place; rather it remains in place until it is withdrawn. An unconscious driver has taken no affirmative act to withdraw their consent, therefore the implied consent remains in place. As a court in one State noted regarding a blood draw of an unconscious driver: "Sims impliedly consented to be tested for alcohol by driving a motor vehicle in Idaho. . . . His alleged unconsciousness does not effectively operate as a withdrawal of his consent." *Sims v. State*, 358 P.3d 810, 817–18 (Idaho Ct. App. 2015).

That view is consistent with this Court's holding in *Birchfield*: there the Court only imposed a limit on what consequences States can impose for withdrawing statutory consent when under investigation, it did not undermine the fundamental principle that statutory consent remains valid until it has been withdrawn. The Court said, "[t]here must be a limit to the *consequences* to which motorists may be deemed to have consented by virtue of a decision to drive on public roads"—and drew the line at the consequence of separate criminal sanctions for a driver's non-cooperation at the scene. *Birchfield*, 136 S. Ct. at 2185 (emphasis added). But in the immediately preceding passage the Court emphasized it was not disturbing the consistent approval of implied consent laws themselves, and that "nothing we say here should be read to cast doubt on them." *Id.* So in the unconscious driver context, statutory consent should be recognized as ongoing, unless withdrawn before a search occurs.

Sometimes, a driver will withdraw statutory consent while interacting with police, before falling

unconscious. Other times, an unconscious driver might become alert before blood is drawn, and at that point withdraw statutory consent. In either of those scenarios, the police should not be allowed to proceed with a warrantless blood draw. But if the sometimes-alert driver does not at any point withdraw statutory consent, the consent remains valid. Likewise, if the driver is unconscious from the outset, statutory consent simply has not been withdrawn. Particularly in States with unconscious driver provisions, it is reasonable for officers to understand that the person's statutory consent remains in effect, despite being unconscious. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (defining the scope of consent by what a reasonable person would understand). And the fact that the person, while unconscious, is unable to withdraw their statutory consent should not alter the analysis. After all, the police can conduct a consensual search of an arrestee's home—based on consent the arrestee conveyed at the jail—without bringing the arrestee with them to give him an ongoing opportunity to interpose an objection. *See, e.g., United States v. Pikyavit*, 527 F.3d 1126, 1128 (10th Cir. 2008) (arrestee's consent impliedly conveyed that officers could still enter his home, even though they found the doors were locked).

Once a person gives consent, statutory or otherwise, the police are under no constitutional obligation to ensure that the person *still* wants to consent—they can proceed with a search.

II. A State's interests in warrantless blood draws outweigh those of the driver when the driver is unconscious.

The touchstone of analysis under the Fourth Amendment is reasonableness. *United States v. Knights*, 534 U.S. 112, 118–19 (2001). The reasonableness of a search is determined by "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). *See also Birchfield*, 136 S. Ct. at 2179–80 (balancing public and private interests to assess whether breath tests and blood tests of impaired drivers are valid as searches incident to arrest).

Balancing public and private interests favors allowing the searches at issue here.

A. With blood draws from unconscious drivers, the public interests are higher.

This Court has repeatedly acknowledged the States' strong interest in obtaining blood or breath samples from impaired driving suspects—in a timely manner, before the evidence of the driver's intoxication naturally dissipates—as part of the States' efforts to keep our public highways safe. *See Birchfield*, 136 S. Ct. at 2166–70; *McNeeley*, 569 U.S. at 1559–61 (plurality opinion); *Neville*, 459 U.S. at 558–59; *Mackey*, 443 U.S. at 17–18; *Schmerber v. California*, 384 U.S. 757, 770–71 (1966). That important public interest need not be detailed again

here. But in the specific context of unconscious drivers, several points must be made.

First, cases with unconscious drivers typically involve an accident. This is readily gleaned from the available statistics: in a recent year, there were 10,874 alcohol-impaired driving fatalities, and 61% of those killed were the drunk drivers themselves; it is logical to infer that in the remaining cases there were a significant number where the prosecuted drunk drivers were sufficiently injured as to be rendered unconscious.[1] Also, every year there are hundreds of thousands of non-fatal alcohol-related crashes involving injuries, and those incidents likely make up many of the cases in which the impaired drivers were sufficiently injured as to become unconscious.[2] Unsurprisingly, a number of the States with unconscious driver provisions specifically contemplate warrantless blood draws in cases involving death or injury to victims.[3] Unlike the record in *Birchfield* which did not address the frequency of unconscious drivers, the experience of Amici States and the statistics above indicate that unconscious drivers arise with unfortunate frequency. Cases of this type

---

[1] NHTSA, Traffic Safety Facts, 2017 Data, Alcohol-Impaired Driving 2 (No. 812630, Nov. 2018). Of course, there are a far larger number of non-fatal alcohol-related crashes, and a correspondingly large number of those incidents likely involve suspects who were rendered unconscious.

[2] NHTSA, The Economic and Societal Impact Of Motor Vehicle Crashes, 2010 (Revised) 3, 158 (No. 812013, May 2015).

[3] *See* Appendix.

are common;[4] 29 states have statutes addressing blood draws from unconscious drivers suspected of drunk driving, suggesting the magnitude of the problem.[5]

Second, with unconscious drivers, less intrusive means of testing are unavailable. As *Birchfield* recognized, breath tests cannot be administered to unconscious persons. *Birchfield*, 136 S. Ct. at 2184. And the usual way of eliciting cooperation at the

---

[4] Treatises devote entire sections to the topic of unconscious drivers suspected of drunk driving, aggregating dozens of cases in the process. *See, e.g.*, Patricia C. Kussman, What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute, Regulation, or Ordinance - Being in Physical Control or Actual Physical Control - Motorist Sleeping or Unconscious, 93 A.L.R. 6th 207, §§ 14-31 (2014) (collecting cases); 1 Flem K. Whited III, *Drinking/Driving Litigation: Criminal and Civil* §7.6 (2d ed. 2016) (same).

[5] *See* Appendix, discussing Ala. Code § 32-5-192(b); Alaska Stat. § 28.35.035(b); Ariz. Rev. Stat. Ann. § 28-1321C; Ark. Code Ann. § 5-65-202(b); Cal. Veh. Code § 23612(a)(5); Colo. Rev. Stat. § 42-4-1301.1(8); Fla. Stat. § 316.1932(1)(c); Ga. Code Ann. § 40-5-55(b); 625 Ill. Comp. Stat. 5/11-501.1(b); Iowa Code § 321J.7; Ky. Rev. Stat. Ann. § 189A.103(2); La. Rev. Stat. Ann. § 32:661B; Md. Code Ann., Cts & Jud. Proc. § 10-305(c); Mo. Rev. Stat. § 577.033; Mont. Code. Ann. § 61-8-402(3); Nev. Rev. Stat. § 484C.160; N.H. Rev. Stat. Ann. § 265-A:13; N.M. Stat. Ann. § 66-8-108; N.C. Gen. Stat. § 20-16.2(b); Ohio Rev. Code Ann. § 4511.191(4); Okla. Stat. tit. 47, §751; Or. Rev. Stat. § 813.140; S.C. Code Ann. § 56-5-2950(H); Tex. Transp. Code Ann. § 724.014 (West); Utah Code Ann. § 41-6a-522; Vt. Stat. Ann. tit. 23, § 1202(a)(2); W. Va. Code, § 17C-5-7(a); Wis. Stat. § 343.305(3)(b); Wyo. Stat. Ann. 1977 § 31-6-102(c). Note that this number does not include those states that have also explicitly acknowledged the problem, but impose additional requirements prior to drawing blood from such unconscious individuals. *See, e.g.*, Tenn. Code Ann. § 55-10-406(i).

scene—a conversation about the implied consent statute—is unavailable. That conversation ordinarily is one of the "broad range of legal tools" available to secure BAC evidence. *McNeely*, 569 U.S. at 160–161 (recognizing the permissible "significant consequences" that flow from a motorist withdrawing consent). That "tool" is unavailable here as a means of conducting warrantless testing, because an unconscious suspect is unable to hear and respond to an officer's explanations. Particularly given the rapid dissipation of alcohol within the blood, discussed below, a blood test based on statutory consent is the least intrusive and most expeditious means of obtaining this information in these particular circumstances.

Third, with unconscious drivers, obtaining a warrant takes more time. The police cannot be expected to begin drafting a search warrant affidavit before they develop probable cause. With unconscious drivers, it often takes longer to develop probable cause, because the police cannot interact with the driver; they will typically not detect slurred speech, hear an admission to drinking, or observe that the driver's balance is unsteady. Until the police collect sometimes conflicting statements from eyewitnesses, they often have no information about whether an unconscious motorist was even driving poorly. At the scene of a collision, it often takes time to determine whether the unconscious driver caused the accident, let alone detect that the driver consumed alcohol. *See, e.g.*, *People v. Schaufele*, 325 P.3d 1060, 1062—63 (Colo. 2014) (plurality opinion) (police did not develop probable cause until they smelled alcohol on driver at

hospital, as his incoherence at the scene could have been due to either intoxication or a head injury); *see also Commonwealth v. March*, 154 A.3d 803 (Pa. Super. Ct. 2017), *rev'd*, *Commonwealth v. March*, 172 A.3d 582 (Pa. 2017) (police developed probable cause only after speaking with accident witnesses, finding paper bag in car, and field testing powder found in bag).[6]

And in addition to slow-developing probable cause, there is another reason warrants in this context take time: the warrant application process itself typically is slower. Articulating why the officer perceives a suspect's lethargic statements to be more like intoxication, rather than the incoherent ramblings of a sober person who has been hit by an airbag, takes time. Explaining why the officer credits the perceptions of one eyewitness rather than another, regarding who was at fault in an accident, also takes time. Unlike run-of-the-mill DUIs, in which officers can use "standard-form warrant applications" to "streamline the warrant process," *see McNeeley*, 569 U.S. at 155, the probable cause statement in these cases must be created from scratch—and be detailed. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983) ("Sufficient information must be presented to the magistrate to allow that official to determine probable

---

[6] Even if officers immediately smell alcohol on an unconscious driver at the scene, without witness statements about a person's driving, the mere presence of an odor of alcohol on the person will not establish probable cause. *See, e.g.*, *State v. Kliphouse*, 771 So.2d 16, 22–23 (Fla. Dist. Ct. App. 2004); *People v. Roybal*, 655 P.2d 410, 413 (Colo. 1982).

cause; his action cannot be a mere ratification of the bare conclusions of others.") Setting aside the fact that many States *require* search warrant applications to be in writing, *see, e.g.*, Colo. Const. Art. II § 7; Mo. Ann. Stat. § 542.276.2(1); *see also* 2 W. LaFave, Search and Seizure § 4.3(b) nn.16–17 (5th ed.), the detailed description of probable cause in these cases would often necessitate a written affidavit. The warrant process itself in such cases therefore takes time.[7]

The public interests favoring warrantless blood draws from unconscious, impaired drivers therefore are strong.

B. With blood draws from unconscious drivers, the private interests are lower.

This Court long ago recognized that blood testing procedures have "become routine in our everyday life." *Breithaupt*, 352 U.S. at 436. Extraction of blood samples for testing remains "commonplace in these days of periodic physical examination," and "for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771. A blood draw in a medical setting by trained personnel is far less intrusive than the types of bodily invasions this Court has found unreasonable. *See Winston v. Lee*, 470 U.S. 753, 759–66 (1985) (chest surgery to remove bullet violated Fourth Amendment where it was

---

[7] While warrantless blood draws in some of these cases might ultimately be upheld under an exigent circumstances theory, the case-by-case, uncertain nature of that inquiry prompts some officers to seek warrants anyway, with resulting delay and the loss of critical evidence.

unnecessary to prove the prosecution's case); *Rochin v. California*, 342 U.S. 165, 172–74 (1952) (stomach pumping to extract narcotics through vomiting violated due process, as it was "brutal" and "offensive to human dignity"). While for many the process of having blood drawn "is not one they relish," it "involves little pain or risk." *Birchfield*, 136 S. Ct. at 2178.

Nonetheless, any compelled intrusion of the human body implicates constitutionally protected privacy interests, *McNeeley*, 569 U.S. at 159 (plurality opinion), and blood draws implicate greater intrusions on a person than breath tests. *Birchfield*, 136 S. Ct. at 2178. But when an impaired driving suspect is unconscious, the analysis of the suspect's interest must be altered.

First, despite the existence of probable cause, some impaired driving suspects—perhaps especially those who are unconscious due to an accident—will be shown, by a timely blood sample, to be innocent. All that is required for probable cause is a "fair probability" that evidence of a crime will be found in a particular place. *Gates*, 462 U.S. at 235, 238. Whether probable cause is determined by a police officer on the scene, or by a magistrate issuing a warrant, there will be cases where blood is drawn based on probable cause, but subsequent testing shows that the person's blood alcohol content was within the legal limit. When this occurs, the person could not even be charged; instead, if there was a multi-car collision, it might be that the *other* driver gets charged, based on testing of *that* person's sample. Timing is critical, because the practice of extrapolating a theoretical earlier BAC

from a sample taken after the act of driving is imprecise. Alcohol dissipation rates vary based on a person's weight, gender, and alcohol tolerance, as well as the circumstances in which alcohol was consumed.[8] Some say the "typical" rate is from 0.015 to 0.02 percent per hour, while others say it is from 0.01 to 0.025 percent per hour.[9] So a person with a 0.03 BAC two hours later might have been driving with a 0.05 BAC—*within the lego! limit*—or a 0.08 BAC, by definition guilty. Since obtaining a warrant in unconscious driver cases takes time, warrantless blood draws will clear some entirely from suspicion, and will help others avoid wrongful convictions.

Second, with unconscious drivers, a blood draw typically causes no pain, anxiety, embarrassment, or even inconvenience. There is no inconvenience because—even if the incident does not involve a collision—an unconscious driver will almost certainly be taken for medical clearance, and therefore will already be encountering medical personnel. There also is no embarrassment in having blood drawn. In *Birchfield* this Court upheld criminal sanctions for those refusing to a take a breath test, in part because breath tests are not "inherently embarrassing;" it likewise will not be embarrassing for an unconscious person, who is already in the presence of medical

---

[8] *See McNeeley*, 569 US. at 152 (plurality opinion).

[9] *See McNeeley*, 569 US. at 152 (discussing typical hourly dissipation rate of 0.015 to 0.02 percent, based on expert's testimony); *cf. id.* at 169 (Roberts, C.J., concurring and dissenting) (discussing typical hourly dissipation rate of 0.01 to 0.025 percent, based on chemistry textbook).

personnel, to undergo a blood draw. And Petitioner appears to concede that the unconscious driver will not experience pain or anxiety. Pet. Br. 38. Petitioner argues instead that the person's mental sensations are not what make a warrantless blood draw significant, *id.*, but this Court has suggested otherwise. In *Birchfield*, one of the reasons this Court deemed blood draws to implicate greater private interests than breath tests was that, for many people, the blood draw process "is not one they relish." 136 S. Ct. at 2178.

To be sure, this Court was also concerned in *Birchfield* that some could feel anxiety about blood testing because it "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC testing." *Id.* But that concern will not be present at the time of the procedure, if the driver is unconscious. And while the driver *later* will become aware that law enforcement has the sample, and might develop anxiety of this sort then, that post-procedure anxiety will be no greater than it would be if the police had obtained the sample after securing a warrant. To the extent the Court is concerned that, "[e]ven if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested," *id.*, there will always be a theoretical possibility that some hypothetical officer might engage in rogue testing. If the Court is concerned with that prospect, and believes the authority of a search warrant would help protect against it, there is a straightforward solution: uphold warrantless blood draws from unconscious

drivers so that the blood sample can be timely obtained, but require the police to secure a post-blood-draw search warrant prior to any testing. The Amici States do not believe such a search warrant is constitutionally required—since "implied consent" constitutes consent to the entire BAC testing process—but it would be one way of addressing this particular concern.

Finally, whether they cause an accident or not, drivers who are sufficiently impaired as to end up unconscious are among the very most dangerous drivers on the road. They should not be placed in a better position than conscious drivers. This Court has upheld the States' ability to compel conscious drivers to cooperate with testing, through the sanctions of administrative license revocation and the admission in evidence, in a criminal trial, of the driver's statement of refusal. *Mackey*, 443 U.S. at 10–19; *Neville*, 459 U.S. at 558–66. It would be counterintuitive at best if the drivers who are most dangerous—those who become unconscious—were able to not only avoid those sanctions but also evade entirely the production of a timely sample for testing, based on implied consent.

CONCLUSION

For these reasons, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

L. ANDREW COOPER*
Deputy Attorney General
**Counsel of Record*

1300 Broadway,
10th Floor
Denver, CO 80203
Andrew.Cooper@coag.gov
(720) 508-6000

Counsel for Amicus Curiae

April 3, 2019

ADDITIONAL COUNSEL

ASHLEY MOODY
Attorney General
State of Florida

JEFF LANDRY
Attorney General
State of Louisiana

CHRISTOPHER M. CARR
Attorney General
State of Georgia

BRIAN E. FROSH
Attorney General
State of Maryland

LAWRENCE G. WASDEN
Attorney General
State of Idaho

KEITH ELLISON
Attorney General
State of Minnesota

KWAME RAOUL
Attorney General
State of Illinois

TIMOTHY C. FOX
Attorney General
State of Montana

CURTIS T. HILL, JR.
Attorney General
State of Indiana

JOSHUA H. STEIN
Attorney General
State of North Carolina

THOMAS J. MILLER
Attorney General
State of Iowa

DAVE YOST
Attorney General
State of Ohio

ANDY BESHEAR
Attorney General
Commonwealth of
Kentucky

MIKE HUNTER
Attorney General
State of Oklahoma

ELLEN F. ROSENBLUM
Attorney General
State of Oregon

JASON R. RAVNSBORG
Attorney General
State of South Dakota

ALAN WILSON
Attorney General
State of South Carolina

APPENDIX

Survey of Unconscious Driver and Victim Injury or Death Provisions

State	Victim Injury or Death Provision	Unconscious Driver Provision
AL	—	"Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent ... and the test or tests may be administered ..." ALA. CODE § 32-5-192(b) (2018)
AK	"If ... arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested." ALASKA STAT. § 28.35.035(a) (2018)	"A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent ... and a chemical test may be administered ..." ALASKA STAT. § 28.35.035(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
AZ	—	"A person who is dead, unconscious or otherwise in a condition rendering the person incapable of refusal is deemed not to have withdrawn the consent ..." ARIZ. REV. STAT. ANN. § 28-1321(C) (2019)
AR	—	"A person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent ... and ... chemical tests may be administered ..." ARK. CODE ANN. § 5-65-202(b) (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
CA	—	"A person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent and a test or tests may be administered .... A person who is dead is deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer." CAL. VEH. CODE § 23612(a)(5) (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
CO	—	"Any person who is dead or unconscious shall be tested to determine the alcohol or drug content of the person's blood or any drug content within such person's system .... If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency shall be allowed to test any blood, urine, or saliva that was obtained and not utilized by a health care provider .... Any person who is dead, in addition to the tests prescribed, shall also have the person's blood checked for carbon monoxide content and for the presence of drugs ..." COLO. REV. STAT. § 42-4-1301.1(8) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
FL	—	"Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such test." FLA. STAT. ANN. § 316.1932(1)(c) (2018)
GA	"[A]ny person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent ... to a chemical test ... if such person is involved in any traffic accident resulting in serious injuries or fatalities." GA. CODE ANN. § 40-5-55(a) (2019)	"Any person who is dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered ... " GA CODE ANN. § 40-5-55(b) (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
IL	"Any person ... involved in a personal injury or fatal motor vehicle accident, shall be deemed to have given consent ... to a chemical test or tests of blood, breath, other bodily substance ..." 625 ILL. COMP. STAT. ANN. 5/11-501.1(a) (2018)	"Any person who is dead, unconscious, or who is otherwise in a condition rendering the person incapable of refusal, shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered ..." 625 ILL. COMP. STAT. ANN. 5/11-501.1(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
IA	"A person who operates a motor vehicle ... under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle [while intoxicated] ... is deemed to have given consent to the withdrawal of specimens of the person's blood ... if ... the person has been involved in a motor vehicle accident or collision resulting in personal injury or death." IOWA CODE ANN. § 321J.6(1) (2019)	"A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is deemed not to have withdrawn the consent provided ... and the test may be given ..." IOWA CODE ANN. § 321J.7 (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
KY	—	"Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided ... and the test may be given." KY. REV. STAT. ANN. § 189A.103(2) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
LA	"The operator of any motor vehicle ... involved in a collision ... in which a fatality occurs shall be deemed to have given consent to, and shall be administered, a chemical test or tests of his blood, urine, or other bodily substance for ... determining the presence of any ... impairing substance." LA. REV. STAT. ANN. § 32:661(A) (2018)	"Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered ..." LA. REV. STAT. ANN. § 32:661(B) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
MD	—	"[T]he type of test administered shall be ... [a] test of blood if: ... [t]he defendant is unconscious or otherwise incapable of refusing to take a test to determine alcohol concentration .... Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of test refusal shall be deemed not to have withdrawn consent." MD. CODE ANN., CTS. & JUD. PROC. § 10-305(a)(1)(i),(c) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
MO	"Any person who operates a vehicle upon the public highways of this state ... shall be deemed to have given consent ... [i]f the person, while operating a vehicle, has been involved in a collision or accident which resulted in a fatality or a readily apparent serious physical injury." MO. ANN. STAT. § 577.020(1); § 577.020(1)(6) (2018)	"Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusing to take a test as provided ... shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered." MO. ANN. STAT. § 577.033 (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
MT	A blood test "must be administered ... when ... the officer has probable cause to believe that the person was driving ... a vehicle ... involved in a motor vehicle accident or collision resulting in serious bodily injury." MONT. CODE ANN. § 61-8-402(2)(a) (2019)	"A person who is unconscious or who is otherwise in a condition rendering the person incapable of refusal is considered not to have withdrawn the consent provided ..." MONT. CODE ANN. § 61-8-402(3) (2019)
NV	—	"If the person to be tested ... is dead or unconscious, the officer shall direct that samples of blood from the person to be tested." NEV. REV. STAT. ANN. § 484C.160(3) (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
NH	—	"Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusing shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered." N.H. REV. STAT. ANN. § 265-A:13 (2018)
NM	—	"Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided ... and the test or tests designated by the law enforcement officer may be administered." N.M. STAT. ANN. § 66-8-108 (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
NC	—	"If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed." N.C. GEN. STAT. ANN. § 20-16.2(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
OH	—	"Any person who is dead or unconscious, or who otherwise is in a condition rendering the person incapable of refusal, shall be deemed to have consented as provided ... and the test or tests may be administered ... " OHIO REV. CODE ANN. § 4511.191(A)(4) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
OK	—	"Any person who is unconscious or otherwise incapable of refusing to submit to a test of such person's blood or breath to determine the alcohol concentration thereof, or to a test of such person's blood, saliva or urine to determine the presence or concentration of any other intoxicating substance therein, shall be deemed not to have withdrawn the consent provided ... and such test may be administered as provided herein." OKLA. STAT. ANN. TIT. 47, § 751(C) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
OR	—	Sample may be drawn when "the police officer has probable cause to believe that the person was driving while under the influence of intoxicants and that evidence of the offense will be found in the person's blood or urine; and ... [t]he person is unconscious or otherwise in a condition rendering the person incapable of expressly consenting to the test or tests requested." OR. REV. STAT. ANN. § 813.140(2)(a),(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
SC	—	"If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken." S.C. CODE ANN. § 56-5-2950(A) (2018)
TX	—	"A person who is dead, unconscious, or otherwise incapable of refusal is considered not to have withdrawn the consent provided ..." TEX. TRANSP. CODE ANN. § 724.014(a) (2017)

State	Victim Injury or Death Provision	Unconscious Driver Provision
UT	—	"[A] person who is dead, unconscious, or in any other condition rendering the person incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided ... and the test or tests may be administered whether the person has been arrested or not." UTAH CODE ANN. § 41-6a-522 (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
VT	"Fatal collision or incident resulting in serious bodily injury. The evidentiary test shall also be required if the person is the surviving operator of a motor vehicle involved in a fatal incident or collision or an incident or collision resulting in serious bodily injury and the law enforcement officer has reasonable grounds to believe that the person has any amount of alcohol or other drug in his or her system." 23 VT. STAT. ANN. TIT. 23, § 1202(a)(4) (2018)	"If in the officer's opinion the person is incapable of decision or unconscious or dead, it is deemed that the person's consent is given and a sample of blood shall be taken." 23 VT. STAT. ANN. TIT. 23, § 1202(a)(2) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
W VA	—	"Any person who is unconscious or who is otherwise in a condition rendering him or her incapable of refusal shall be considered not to have withdrawn his or her consent for a test of his or her blood or breath as provided ... and the test may be administered ..." W. VA. CODE ANN. § 17C-5-7(a) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
WI	"If a person is the operator of a vehicle that is involved in an accident that causes substantial bodily harm ... to any person, and a law enforcement officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof, the law enforcement officer may request the operator to provide one or more samples of his or her ... blood ..." WIS. STAT. ANN. § 343.305(ar)1 (2018)	"A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection[.]" WIS. STAT. ANN. § 343.305(3)(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
WY	—	"Any person dead, unconscious or otherwise in a condition rendering him incapable of cooperating with the administration of the tests is deemed to have given his consent provided by ... this section and the tests may be administered ..." WYO. STAT. ANN. § 31-6-102(b) (2018)